Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs	)	CC Docket No. 01-92
Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

REPLY COMMENTS OF AT&T WIRELESS SERVICES, INC.

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AT&T Wireless Services, Inc. ("AWS") provides the following reply comments in support of the petition filed by several other commercial mobile radio service ("CMRS") providers reaffirming that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of telecommunications under the Communications Act.

DISCUSSION

Not surprisingly, the opening comments are comprised largely of associations or representatives of small incumbent local exchange companies ("ILECs") who oppose the Petition, and CMRS providers who support the Petition. No commenting party disputes that ILECs are entitled to compensation for transporting and terminating calls originated by CMRS providers' customers. The dispute centers on how to establish rates, terms,

and conditions governing such compensation – and compensation for the CMRS provider for calls that it transports and terminates on behalf of the ILEC's customers.

The commenting ILECs have failed to demonstrate that wireless termination tariffs are consistent with the Communications Act ("Act") or the Commission's implementation of the Act, both before and after enactment of the Telecommunications Act of 1996 ("Telecommunications Act"). The ILECs' comments describing state commission decisions permitting or requiring such tariffs only highlight the need for the Commission to ensure uniformity and compliance with wireless interconnection requirements. ILEC concerns that they are not being compensated for wireless traffic they terminate can be addressed through legal and far less drastic measures than permitting ILECs unilaterally to file and enforce state wireless termination tariffs. Any such measures, however, should ensure that *both* the ILEC and CMRS provider receive reciprocal compensation for traffic they terminate on behalf of the other's subscribers within the Metropolitan Trading Area ("MTA").

1. Wireless Termination Tariffs Are Inconsistent With the Communications Act.

The commenting ILECs unsuccessfully attempt to justify the legality of wireless termination tariffs on several grounds. Some ILECs contend that the Act permits states to adopt their own interconnection requirements, including approving tariffs governing interconnection. The ILECs further claim that such tariffs are appropriate as long as a requesting carrier has the option of negotiating an agreement that supercedes the tariff. Some commenting parties even go so far as to maintain that the Act does not apply to such tariffs. None of these arguments withstand scrutiny.

The Commission long ago determined that an ILEC engages in bad faith actionable under Section 208 of the Act if it unilaterally files a wireless termination tariff.[1] The ILECs attempt to dismiss these Commission determinations as predating the Telecommunications Act. As AWS explained in its opening comments, however, both the Commission and reviewing courts have confirmed that the Commission's authority to regulate interconnection between ILECs and CMRS providers under Section 332 remained unchanged following passage of the Telecommunications Act.[2] The ILECs thus have not – and cannot – distinguish the Commission's prior determinations that unilateral wireless termination tariffs are inconsistent with ILECs' obligations under the Act.[3]

Many of the ILEC commenters nevertheless contend that wireless termination tariffs are consistent with the provisions of the Act preserving states' ability to enforce their own interconnection obligations.[4] Such obligations, however, must be imposed "in

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[1] Petition at 8-9 and Commission decisions cited therein.

[2] AWS Comments at 4-6.

[3] One commenter makes the novel argument that Section 332 does not apply to the "indirect" interconnection at issue here because the statutory language uses the phrase "physical connection." Missouri STCG Comments at 20-21. This argument defies both logic and language. "Physical" means "having material existence." Webster's New Collegiate Dictionary at 859 (G & C Merriam Co. 1981). Both "direct" and "indirect" interconnection have material existence. The practical implication of the Missouri STCG's position, moreover, is that Congress did not provide the Commission with jurisdiction over interconnection between CMRS providers and smaller ILECs. Nothing in the Act or in any Commission or judicial interpretation of the Act supports such an illogical limitation on the Commission's authority.

Another commenter contends that the Commission's jurisdiction is limited to those circumstances in which a CMRS provider "requests" interconnection, which must be determined on an individual carrier basis. Alliance Comments at 19-20. The Commission has never taken such a crabbed view of the statutory language or its authority to establish reasonable requirements for interconnection between wireless and wireline providers on an industry-wide basis.

[4] Several of the ILECs attempt to buttress their argument by citing *U S WEST Communications, Inc. v. Sprint Communications Co.*, 275 F.3d 1241, 1250 n.10 (10th Cir. 2002), for the proposition that tariffs are not inconsistent with the Act. The case does not support that proposition. At issue in that case was a clause in a state commission arbitrated interconnection agreement that required the ILEC to permit the CLEC to "opt into" more favorable tariff provisions. The court did not address the legality of ILEC tariffs but determined only that the Act did not prohibit a CLEC with an interconnection agreement from also

fulfilling the requirements of" the Telecommunications Act and "not inconsistent with the provisions of" the Telecommunications Act.[5] In addition to being inconsistent with the Commission's interpretation of Section 332 (which is not part of the Telecommunications Act), wireless termination tariffs do not comply with either of these requirements.

These ILECs do not point to *any* requirement in the Telecommunications Act that these tariffs are intended to fulfill. To the contrary, these commenters (and apparently the Missouri Public Service Commission and a lower state court) take the position that "wireless termination tariffs are not interconnection agreements or reciprocal compensation arrangements."[6] Nor can the ILECs plausibly argue that such tariffs are not inconsistent with the provisions of the Telecommunications Act. Those provisions, particularly as interpreted by the Commission, expressly require the ILECs to interconnect with other carriers and "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[7] These ILECs concede that their tariffs are filed in lieu of compliance with those obligations and thus flatly conflict with the Telecommunications Act.

One ILEC association disagrees with other ILEC commenters and contends that its wireless termination tariff fulfills the obligations under Section 251(b)(5), including the requirement that both interconnecting carriers receive compensation for transporting

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purchasing comparable tariff services at more favorable terms and conditions. The court made clear, however, that regardless of whether the CLEC purchased services out of the agreement or "opted into" the tariff, the CLEC "is acting *through* its interconnection agreement and with the approval of the [state commission]." *Id*. at 1251 (emphasis in original). The ILECs here, in sharp contrast, propose that CMRS providers be required to purchase services required under the Act through a tariff, not an interconnection agreement.

[5] 47 U.S.C. § 261(b); *accord id*. § 251(d)(3).

[6] Missouri STCG Comments at 15; *accord, e.g.,* Missouri ITG Comments at 8-11.

and terminating local telecommunications traffic originated by the other carrier.[8] That commenter also asserts, however, that rural ILECs are exempt from the obligation to negotiate agreements and that tariffs are their only means of complying with the Act. Acceptance of this position would create the worst of both worlds – ILECs would be able unilaterally to establish rates, terms, and conditions for interconnection with CMRS providers and the CMRS providers would have no ability to negotiate or arbitrate their own agreement. Nothing in the Act authorizes such an outcome, which directly conflicts with both the statutory scheme and the Commission's requirements.

Another commenter has suggested that a wireless termination tariff is equivalent to a statement of generally available terms ("SGAT"), which is expressly authorized under the Telecommunications Act.[9] Quite apart from the fact that Congress expressly authorized SGATs only for Bell Operating Companies ("BOCs"),[10] tariffs are not SGATs. An SGAT, as the name indicates, consists of *available* terms, *i.e.*, terms that the ILEC makes as a standard offer to interconnecting carriers, usually in the form of a template agreement.[11] An SGAT has no force or effect until the interconnecting carrier accepts those terms. A wireless termination tariff, in sharp contrast, applies automatically, regardless of whether the CMRS provider agrees to its terms. Wireless termination tariffs, therefore, are not equivalent to an SGAT.

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[7] 47 U.S.C. § 251(a)(1) & (b)(5).
[8] Michigan ILECs Comments at 4-7.

[9] Alliance Comments at 15.

[10] 47 U.S.C. § 252(f).

[11] Qwest Corporation, for example, maintains SGATs with each of the state commissions in the fourteen states in which it operates as an ILEC which are in the form of a complete, unexecuted interconnection agreement.

Finally, ILECs cannot plausibly claim that wireless termination tariffs nevertheless are appropriate because a CMRS provider can avoid compliance with wireless termination tariffs by requesting negotiations.[12] Congress and the Commission have required ILECs to negotiate rates, terms, and conditions for interconnection and reciprocal compensation, and nothing in the Act or Commission rules authorizes any carrier unilaterally to file a tariff establishing such rates, terms, and conditions pending compliance with those requirements. Such tariffs directly conflict with federal legal requirements, regardless of whether they are subject to replacement by a negotiated agreement. Wireless termination tariffs, therefore, are unlawful, and the ILECs have failed to demonstrate otherwise.

2. Individual State Commission Proceedings Demonstrate the Need for Commission Action.

The Petition references state proceedings in Missouri that have been particularly problematic with respect to the unilateral imposition of wireless termination tariffs.[13] Not surprisingly, three different associations of ILECs (or representatives of ILEC interests) in Missouri filed comments in response to the Petition and provided additional information about those proceedings.[14] Far from supporting the legality or necessity of wireless termination tariffs, this additional information provides further evidence that the Commission needs to assert its authority over CMRS interconnection and to ensure that ILECs satisfy the mandates of the Act and Commission decisions implementing the Act.

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[12] As discussed above, some rural ILECs (with the support of at least one state commission) contend that they are exempt from the obligations of Section 251(c), including the obligation to negotiate interconnection agreements, and thus claim the right both to maintain a wireless termination tariff and to refuse to negotiate a separate interconnection agreement to replace that tariff. Michigan ILEC Comments at 4-7; Montana ILEC Comments at 5-6 & Attachment.

[13] Petition at 4-5.

[14] *E.g.*, Missouri STCG Comments; MITG Comments.

The Missouri Public Service Commission and the Circuit Court of Cole County, Missouri take a very different view of the Act than has Congress and the Commission. The Missouri Commission concluded (and the state court agreed) with respect to wireless termination tariffs:

> "The Act does not state that reciprocal compensation is a necessary component of the tariffs of LECs or ILECs. Therefore the [Missouri] Commission concludes that Section 251(b)(5) simply does not apply to the proposed tariffs herein at issue. For the same reason the Commission concludes that the proposed tariffs are not unlawful under Section 251(b)(5)."[15]

The tariffs seek compensation for transporting and terminating local telecommunications traffic delivered to the ILEC by a CMRS provider. The Commission has defined "reciprocal compensation" as an arrangement between interconnected carriers "in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier."[16] The tariffs unambiguously govern reciprocal compensation as defined by the Commission yet require that such compensation be paid only to the ILEC, not to the CMRS provider. The conclusion is inescapable that Section 251(b)(5) and Commission Rules implementing that section apply to any such requirements, and the Missouri Commission's contrary conclusion is nothing short of unsupportable.

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[15] MITG Comments at 8-9 (quoting or summarizing *In re Mark Twain Rural Tel. Co Proposed Tariff to Introduce Wireless Termination Service*, MOPSC Docket No. TT-2001-139, Report and Order at 29-30 (Feb. 8, 2001) ("MOPSC Order") (emphasis omitted).

[16] 47 C.F.R. § 51.701(e).

Similarly, the Missouri Commission concluded (with the agreement of the lower state court) in the context of the reciprocal compensation rates that the ILEC proposed to charge CMRS providers under its wireless termination tariff:

> "The reciprocal compensation pricing standard of the Act provide guidance to state commission in the arbitration of agreements. Like the obligation to establish reciprocal compensation arrangements, the pricing standards of section 252(d) do not apply to the proposed tariffs. For the same reason the tariffs are not unlawful under section 252(d)."[17]

Nothing in the language of Section 252(d) limits its applicability to state arbitration of agreements. Even if such a limitation could be implied, that implication would only be appropriate in light of the Act's express requirement that ILECs negotiate and/or arbitrate – not unilaterally file tariffs to establish – the rates, terms, and conditions applicable to access to, and interconnection with, their networks. Again, the Missouri Commission's conclusion to the contrary cannot be squared with the plain language of the Act and Commission rules.

The practical impact of the Missouri Commission's interpretation, moreover, would be that ILECs could simply file state tariffs governing any and all aspects of access to, and interconnection with, their networks, with non-TELRIC-based rates, that would apply in the absence of an interconnection agreement to the contrary. Congress and the Commission have flatly rejected that approach. The refusal of the Missouri Commission (and a lower state court) to acknowledge that rejection highlights the need

[17] MITG Comments at 9 (quoting or summarizing MOPSC Order at 32-33) (emphasis omitted); *id*. at 10 ("The FCC's pricing rules, including the provisions that require the use of forward-looking economic costs, apply only to negotiated or arbitrated reciprocal compensation agreements under the Act. They do not apply to tariffs filed in the absence of such agreements.") (quoting or summarizing Circuit Court Findings of Fact, Conclusions of Law, and Judgment at 9-10).

for a Commission decision precluding any state commission from effectively rewriting the Act to further benefit ILECs.

The Montana Commission has taken a conflicting approach that nevertheless results in a similar outcome. According to that commission, rural ILECs are exempt from the obligations of Section 251(c) – including the obligation to negotiate interconnection agreements – and cannot be compelled to arbitrate disputes with interconnecting carriers.[18] In response to carriers requesting interconnection with these ILECs, the Montana Commission has required at least one rural ILEC to "file a tariff, providing the details of a reciprocal compensation arrangement that will be available to interconnecting carriers desiring such an arrangement."[19] Apparently in Montana, therefore, CMRS providers must request that the ILECs file a tariff to establish the rates, terms, and conditions that will govern interconnection and reciprocal compensation and have no opportunity to negotiate or arbitrate an interconnection agreement.

The Missouri and Montana Commissions determinations conflict with each other as well as with the Act and this Commission's requirements. Commission action on this Petition is needed to bring uniformity to, and provide additional guidance to state commissions on, the procedures for establishing rates, terms, and conditions for interconnection and reciprocal compensation between ILECs and CMRS providers.

3. Wireless Termination Tariffs Are Not Necessary to Protect ILECs' Interests.

The commenting ILECs complain that wireless termination tariffs provide a needed incentive to CMRS providers to request negotiations for an agreement under the

[18] Montana ILEC Comments at 5-6 & Attachment.

[19] *Id.*, Attachment at 1.

Act.[20] Even if some CMRS providers have resisted initiating negotiations for an interconnection agreement with rural ILECs, an unlawful wireless termination tariff does not become lawful because it compels a CMRS provider to request negotiations for an agreement to replace that tariff. Perhaps more to the point, however, the ILECs' argument reflects their legitimate concern that CMRS providers should not be able to avoid their reciprocal compensation obligations by simply refusing to request negotiations for an interconnection agreement while continuing to exchange traffic. The ILECs' concern may be legitimate, but using wireless termination tariffs to address that concern is not.

The Commission has previously determined that as monopoly providers of access to their networks, ILECs already enjoy substantial bargaining power with interconnecting carriers, and unilaterally filing a tariff improperly increases that advantage. The fact that some CMRS providers have requested negotiations after wireless termination tariffs have been imposed demonstrates only that a sledgehammer can be used to swat fly. If ILECs are truly concerned about receiving reciprocal compensation – not just evading the requirements of the Act – far less drastic, as well as legal, means could be used. Pending the outcome of its intercarrier compensation rulemaking, for example, the Commission could establish that a reciprocal compensation payment obligation arises on the date that an ILEC formally notifies a CMRS provider that it seeks explicit reciprocal compensation. Compensation for traffic exchanged after that date would be paid at the

[20] Some ILECs make a related claim that they cannot determine the origin of the traffic routed through the BOC tandem and thus "do not know which carriers the CMRS Petition would have them approach in order to request negotiations." OPASTCO Comments at 4; *accord, e.g.,* Oklahoma RTC Comments at 4. None of these commenters, however, explain how or why a wireless termination tariff enables the ILEC to identify the origin of the traffic. In any event, the problem results from the failure of the BOCs to provide sufficient call detail information, not any attempt by CMRS providers to conceal the origin of the traffic they are routing through the BOC tandem. *See, e.g.,* FW&A Comments at 3.

rates included in the parties' interconnection agreement, once the agreement has been executed. Alternatively, the Commission could establish proxy reciprocal compensation rates that would apply to such traffic until the rates in the interconnection agreement become effective.[21] Either alternative would ensure that the ILEC is compensated for traffic it transports and terminates without resorting to filing a unilateral wireless termination tariff.

Any such compensation scheme, however, must also apply to the traffic that the ILEC delivers to CMRS provider for transport and termination. Many of the commenting ILECs contend that little or no such traffic exists, at least in rural service territories, because land-to-mobile calls are routed via an interexchange carrier ("IXC").[22] As at least one ILEC representative candidly concedes, "The current intercarrier compensation system, which categorizes existing intercarrier compensation arrangements as either access charges (for long distance traffic) or reciprocal compensation (for local traffic), is part of the problem in this proceeding."[23] The "IXCs" through which the rural ILECs deliver traffic to CMRS providers in the vast majority of cases are the BOCs, which continue to dominate intraLATA toll markets. Indeed, such traffic is routed over the same trunk groups over which the BOC delivers traffic from CMRS providers to the other ILECs.[24] Yet, the ILECs disingenuously claim that they are entitled to compensation from the CMRS providers for the traffic that the ILECs terminates from

[21] One other commenter similarly proposed that the Commission establish a proxy reciprocal compensation rate for rural ILECs and CMRS providers, although in the context of a wireless termination tariff. TCA Comments at 5-6.

[22] *E.g.*, Oklahoma RTC Comments at 10-13; Missouri STCG Comments at 21-24.

[23] TCA Comments at 3.

[24] *See, e.g., id*.

wireless subscribers while disclaiming any responsibility to compensate CMRS providers for terminating calls that the ILECs' landline customers make to CMRS subscribers.

The ILECs are not entitled to have their cake and eat it too. Reciprocal compensation means just that – *both* carriers are entitled to compensation from the other for terminating calls from the other carrier's subscribers. Whether access charges apply to the IXC routing the land-to-mobile traffic is irrelevant, just as the transiting rate that the CMRS provider pays the BOC to route mobile-to-land traffic is irrelevant. Each of the carriers providing dial tone service to the subscribers placing and receiving the calls has the same obligation to pay, and entitlement to receive, reciprocal compensation for transporting and terminating those calls. If the Commission concludes that it should establish a proxy reciprocal compensation rate for rural ILEC interconnection with CMRS providers, therefore, the Commission should make clear that that rate applies to all traffic exchanged between the carriers within the MTA, not just to the mobile-to-land traffic.

CONCLUSION

For the foregoing reasons, as well as the reasons stated in the Petition and AWS's opening Comments, the Commission should grant the Petition and enter an order prohibiting ILECs from filing tariffs to establish rates, terms, or conditions for interconnection with CMRS providers.

Respectfully submitted,

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